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No. 92-1067

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,

Petitioner

v.

KARIN APARO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION (WITH ATTACHED APPENDICES)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF CONNECTICUT, Petitioner

v.

KARIN APARO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The Respondent, Karin Aparo, respectfully requests that this Court deny the petitioner for a writ of certiorari seeking review of the Connecticut Supreme Court's decision in *State of Connecticut v. Karin Aparo*, 223 Conn. 384, 614 A.2d 401 (1992) (*see* Petitioner's Appendix, 1A-28A, hereinafter "Pet. App. __").

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 223 Conn. 384, 614 A.2d 401 (1992) and is reprinted in Petitioner's Appendix at 1A-28A.

STATEMENT OF THE CASE

The respondent, Karin Aparo, who was sixteen at the time of her arrest, was charged with one count of murder as an accessory in violation of Connecticut General Statutes §§ 53a-54a(a) and 53a-8, and one count of conspiracy to commit murder in violation of Connecticut General Statutes §§ 53a-48(a) and 53a-54a(a). *State v. Aparo*, 223 Conn. 384, 385-6 (1992) (Pet. App. 2A-3A). A jury of twelve acquitted her of the accessory charge but could not reach a verdict on the conspiracy charge. After the trial court declared a mistrial on the conspiracy count, the state announced its intention to retry the respondent on that count. *Id.*, 223 Conn. at 386 (Pet. App. at 3A).

The respondent filed a motion to dismiss all pending charges. Upon the trial court's denial of this motion, the respondent took an interlocutory appeal, raising three issues: (1) principles of double jeopardy preclude retrial when six out of twelve jurors vote for acquittal; (2) principles of collateral estoppel preclude retrial because the jury necessarily found that she had never intended that her mother be killed; and (3) principles of collateral estoppel require the exclusion of certain evidence, leaving insufficient admissible evidence to warrant a retrial. *Id.*

The Connecticut Supreme Court rejected the first and second of these claims, but it accepted the third claim in part. *Id.*, at 387 (Pet. App. at 4A).

The Petitioner challenges the Connecticut Supreme Court's decision on two grounds: (1) that it was error to apply collateral estoppel to a case of continuing jeopardy;[1] and, (2) that it was error to preclude the reuse of evidentiary facts.

In its decision, the Connecticut Supreme Court discussed at length whether or not the principle of collateral estoppel, as enunciated in *Ashe v. Swenson*, 397 U.S. 436 (1970), applied when a jury acquits on one count of a multicount indictment and does not reach a verdict on another count. *See Aparo*, 223 Conn. at 391 (Pet. App. at 8A-9A).

The Connecticut Supreme Court, relying upon decisions from the federal circuit courts,[2] concluded that collateral estoppel bars the state from relitigating a question of ultimate fact that was determined in the respondent's favor by a partial verdict. *Id.*, at 388-93 (Pet. App. at 5A-10A). In reaching its conclusion, the Connecticut Supreme Court quoted from *United States v. Mespoulede*, 587 F.2d 329, 336-7 (2d Cir. 1979):

> We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue

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[1] The Petitioner did not raise this claim on appeal; rather, after the Connecticut Supreme Court issued its decision, the Petitioner raised this issue in its Motion to Reconsider.

[2] The Court was persuaded by the reasoning in *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979) (citing cases); and, *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989, *cert. denied sub nom. DeBusk v. United States*, 493 U.S. 1083 (1990).

> we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it supposed to represent. Occasional anomalies are the price of unanimity. . . .
>
> Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed . . . implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the same ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id., at 392 (Pet. App. at 9A).

Thus, the Connecticut Supreme Court reached the merits of the respondent's claims and affirmed the trial court's decision that collateral estoppel did not act as a complete bar to retrial. *Aparo*, 223 Conn. at 387-8, 401-4 (Pet. App. at 18A-21A).

However, the Connecticut Supreme Court reversed the trial court's decision that no evidence should be excluded at a retrial and held that "evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it would establish an element of the charged offense and could therefore form the basis of the conviction." *Id.* at 409 (citations omitted) (Pet. App. at 26A).

The court further noted that "the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill." *Id.* In particular, the court determined that the state may not introduce Coleman's testimony that the respondent requested, on the night before the murder took place, that Coleman kill her mother. *Id.*, at 410 (Pet. App. at 27A).

REASONS FOR DENYING THE WRIT

I. The Petitioner Does Not Raise A Substantial Federal Claim Worthy Of This Court's Review Because It Was Not Presented Below And The Connecticut Supreme Court Properly Applied The Principle Of Collateral Estoppel To The Case At Bar In Accordance With Established Law.

A. The Petitioner Is Precluded From Challenging The Connecticut Supreme Court's Application Of The Principle Of Collateral Estoppel To The Case At Bar Since The Petitioner Failed To Press This Issue Below.

The petitioner never raised the issue of whether the principle of collateral estoppel is applicable in a situation where the jury had acquitted on one charge and failed to reach a verdict on another charge either in the trial court or before the Connecticut Supreme Court. "[I]t is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-5 (1940)).

While the Connecticut Supreme Court passed upon this issue in its decision, the petitioner never raised it, and therefore, it is not entitled to raise it now. *See Gates*, 462 U.S. at 217-24. (no reason to treat the state's failure to

have challenged an asserted federal claim differently from the failure of the proponent of federal claim to have raised that claim). Accordingly, this Petition must be denied.

B. Since The Jury's Verdict Of Acquittal On The Murder Count Represents A Valid And Final Judgment, The Connecticut Supreme Court Properly Applied The Principle Of Collateral Estoppel To The Case At Bar In Accordance With Established Law.

The Connecticut Supreme Court, relying upon *Ashe v. Swenson*, 397 U.S. 436 (1970), properly recognized that whenever an issue of ultimate fact has once been determined by a *valid and final judgment*, that issue cannot be litigated between the same parties in any future lawsuit. *Aparo*, 223 Conn. at 389 (quoting *Ashe v. Swenson*, 397 U.S. at 443) (Pet. App. at 6A). Therefore, it properly applied the principle of collateral estoppel to the case at bar since the jury's verdict of acquittal on the murder count represented "a valid and final judgment."

In *Ashe v. Swenson*, this Court defined collateral estoppel as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

> ... the rule of collateral estoppel is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Ashe v. Swenson, 397 U.S. at 443-4.

The petitioner's argument that collateral estoppel is inapplicable to a mistried count at a retrial is inapposite to *Ashe v. Swenson*. Since the determination of whether collateral estoppel is applicable is based upon the previous judgment of acquittal, it would make no sense to apply it to a successive prosecution case, but not on a mistried count at a retrial.

The primary purpose of the doctrine of collateral estoppel is to protect an accused from the unfairness of being required to relitigate an issue which has been once determined in his favor by a verdict of acquittal. *See Ashe*,

397 U.S. at 446 (it "protects a man who has been acquitted from having to 'run the gauntlet' a second time"). The Court of Appeals for the Second Circuit in *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979), noted that "... once a defendant has satisfied one jury that he is not guilty of a crime, constitutionally-rooted considerations of fairness preclude the Government from injecting any issues necessarily decided in his favor into a second trial for another offense." *Mespoulede*, 597 F.2d at 330.

In *Mespoulede*, the Second Circuit held that collateral estoppel bars the Government from relitigating a question of fact that was determined in the defendant's favor by a partial verdict. *Id.*, at 336-7. In that case, the defendant was charged in a two count indictment with conspiracy to distribute cocaine and with possessing cocaine with the intent to distribute. *Id.*, at 330. The jury acquitted the defendant on the possession count, but it failed to reach a verdict on the conspiracy count. *Id.*, at 332. At retrial on the conspiracy count, the trial court denied the defendant's motion to bar the Government from introducing evidence that he possessed cocaine.

The Second Circuit reversed, stating that since evidence of possession was introduced to persuade the second jury of the same fact already litigated and resolved in the defendant's favor, it would be "inequitable" to refuse the assertion of collateral estoppel. *Id.*, at 335. The court further noted:

> Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant

> to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id., at 336-7.

Therefore, the Connecticut Supreme Court properly applied the principle of collateral estoppel to the conspiracy count because the jury's verdict of acquittal on the murder count was a valid and final judgment.

The petitioner argued that the continuing jeopardy principle should preclude application of collateral estoppel in the acquittal-deadlock-retrial scenario and analogized it to the circumstances of *Price v. Georgia*, 398 U.S. 323 (1970). *See* Petitioner's Petition at 13-4. However, such an analogy is not warranted. In *Price*, the jury had acquitted the defendant of murder and convicted him of the lesser included offense of voluntary manslaughter. 398 U.S. at 324. After the conviction was reversed on appeal, the defendant was again placed on trial under the original murder charge. The second jury also convicted him of voluntary manslaughter. This Court held that because the defendant sought and obtained the reversal of his initial conviction by taking an appeal, double jeopardy did not prevent a retrial for that crime. *Id.*, at 326-7. However, this Court also held that double jeopardy required that the retrial be limited to that lesser offense, and therefore, reversed his conviction. *Id.*, at 327-32.

There is no analogy between *Price* and the case at hand. In *Price*, the defendant was acquitted of murder and convicted on the lesser included offense of voluntary manslaughter. By appealing his conviction, he waived any

claim of double jeopardy on a retrial for that offense. In the instant matter, the respondent has not waived her constitutional claim against being required to relitigate an issue which has been once determined in her favor by a verdict of acquittal. The jury acquitted her on the charge of murder and could not reach a verdict on the charge of conspiracy to commit murder. It is the respondent's position that based upon the acquittal on the murder charge, the jury necessarily found in her favor on an element that the petitioner will have to prove at the retrial. Therefore, the respondent will be litigating a second time at least one factual issue that has previously been decided in her favor. Accordingly, there is nothing to be gained by comparing the case at hand with this Court's decision in *Price v. Georgia*.

The petitioner also argued that the respondent should not be allowed to assert collateral estoppel on retrial because "the second trial is the result of a neutral occurrence" -- jury deadlock as opposed to prosecutorial abuse. However, the respondent does not agree that the second trial is the result of a neutral occurrence; rather the respondent submits that the jury deadlock was caused by aberrant judicial procedure. Specifically, when all the circumstances of the proceedings below are examined, it is clear that the jury was unable to reach a verdict on the conspiracy count[3] due to the confusing instructions it

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[3] The conspiracy count is unique in that the petitioner charged the crime of conspiracy in two subsections with the time frame being the only difference between them. Subsection (a) alleged a conspiracy that began in the summer of 1986 when the respondent was fifteen years old and ended on August 5, 1987 when the she was sixteen while subsection (b) alleged the same time frame as alleged

received from the trial court. The court initially noted the following:

> I've just given you one instruction on the two parts of the count of conspiracy. However, it applies to both parts, so you must consider both each part separately and make a finding as to each part separately.
>
> .....
>
> As to the second count, each part will be read separately, so the clerk will read part (a), and then ask how did the jury find the defendant, guilty or not

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in the substantive murder count; that is, a conspiracy for an approximately two-week time period directly prior to the murder when the respondent was sixteen years old. The conspiracy count charged two subcounts as follows:

> a) at or near the town of Glastonbury, Connecticut on divers dates between August 1986 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY; and
>
> b) at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY.

See Respondent's Appendix 2A.

guilty . . . and then the second part will be read, and, likewise, the foreperson will be asked.

See Respondent's Appendix at 3A.

However, after eight days of deliberations, the trial court reinstructed the jury on the conspiracy count. On the day before the jury announced that it was deadlocked on the conspiracy count, the jury requested "to rehear [the court's] instructions regarding the distinction between count two conspiracy charges (a) and (b)." *See* Respondent's Appendix 4A. The court responded by charging: "the distinction is only one of semantics, because if you were to find the elements of either (a) or (b), you would necessarily find all of the elements of the other." *See* Respondent's Appendix 4A.

This instruction, in conjunction with the earlier instruction, was ambiguous and confusing and could account for the jury's inability to reach a verdict on that count. Therefore, the petitioner's argument that the second trial was the result of a neutral occurrence is without merit.

The petitioner's claim that the Connecticut Supreme Court's application of collateral estoppel to a mistried count conflicts with this Court's recent pronouncements on double jeopardy law in *United States v. Felix*, ___ U.S. ___, 112 S. Ct. 1377 (1992), fails to recognize that the protection afforded a defendant by the collateral estoppel

principles in *Ashe v. Swenson* is separate and distinct from that accorded by the traditional *Blockburger* line of cases.[4]

In *Felix*, the defendant was convicted in Missouri on the crime of attempting to manufacture drugs. In order to establish the defendant's intent, the government had introduced evidence that he had manufactured drugs in Oklahoma. *Felix*, 112 S. Ct. at 1379-81.

Subsequently, he was charged with both conspiracy and the substantive counts in Oklahoma in relation to his manufacturing activities there. Two of the overt acts supporting the conspiracy charge were based on the same conduct that had been the subject of the Missouri prosecution. *Id.*

At the trial in Oklahoma, the government introduced much of the same evidence from the Missouri and Oklahoma transactions that had been introduced in the Missouri trial. The defendant was convicted, but the Tenth Circuit reversed most of the counts on which he had been found guilty on the ground that trial on these counts constituted double jeopardy in violation of the Fifth Amendment. *Id.*

This Court reversed the Tenth Circuit and held that prosecution of a defendant for conspiracy, where certain of

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[4] "Collateral estoppel is distinct from double jeopardy in the sense that the traditional bar of double jeopardy prohibits the prosecution of the crime itself, whereas collateral estoppel, in a more modest fashion, simply forbids the government from relitigating certain facts in order to establish the fact of the crime." *United States v. Mulherin*, 710 F.2d 731 (11th Cir. 1983).

the overt acts relied upon by the Government are based upon substantive offenses for which the defendant has been previously convicted, does not violate the double jeopardy clause. *Id.*, at 1380. This Court stated:

> The actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses. In short, none of the offenses for which Felix was prosecuted in the Oklahoma indictment is in any sense the "same offense" as the offense for which he was prosecuted in Missouri.

Id., at 1382. This Court further noted that "a mere overlap in proof between two prosecutions does not establish a double jeopardy violation." *Id.*

Felix was not a collateral estoppel case, but a traditional double jeopardy case that clarified this Court's holding in *Grady v. Corbin*, 495 U.S. 508 (1990). Collateral estoppel analysis, which focuses upon a valid and final judgment of acquittal, is different than traditional double jeopardy analysis. Since this Court's decision in *Felix* did not overrule *Ashe v. Swenson*, the Connecticut Supreme Court's application of collateral estoppel to the case at bar, where the respondent was acquitted of a charge, does not conflict with this Court's recent pronouncements on double jeopardy law.

The petitioner also argued that collateral estoppel should not apply where the state tried both counts simultaneously and pointed to dicta from this Court's decision in *Ohio v. Johnson*, 467 U.S. 493 (1984). *See*

Petitioner's Petition at 15. However, the instant case is distinguishable from *Ohio v. Johnson*.

In *Johnson*, the defendant was charged with murder, involuntary manslaughter, grand theft and aggravated robbery. After the defendant pled guilty to the lesser offenses of involuntary manslaughter and grand theft, the trial court dismissed the remaining counts on the ground that further prosecution was barred by double jeopardy. *Johnson*, 467 U.S. at 494. The United States Supreme Court reversed and held that prosecuting the defendant on the two remaining charges would not constitute the type of "multiple prosecution" prohibited by the double jeopardy clause because he "has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshall its evidence and resources more than once ..." . *Id.*, at 494, 501.

In a footnote, this Court addressed the defendant's argument that collateral estoppel bars prosecution on the remaining charges. This Court stated that "...the taking of a guilty plea is not the same as an adjudication on the merits after full trial, such as took place in *Ashe v. Swenson*." *Id.*, at 500 n.9.

The case at bar is easily distinguishable from *Ohio v. Johnson* in that because like in *Ashe*, there was an adjudication on the merits: the jury's verdict of acquittal on the charge of murder represents a final judgment which constitutes a valid determination of issues of ultimate fact. Just because the jury failed to reach a verdict on the conspiracy count does not make the validity of the determination of acquittal on the murder count questionable. Rather, based upon the final judgment of the

acquittal, to permit a second jury to reconsider the very issue of ultimate fact upon which the Defendant prevailed implicates fundamental constitutional concerns of fair play.

In *dicta*, this Court stated: "Moreover, in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Id.*, at 500 n.9. The petitioner argued that this indicates that *Ashe* was never intended to apply to cases where the state tried both counts simultaneously and the jury acquitted on one count and hung on the other.

However, such an interpretation ignores the rationale of collateral estoppel which is that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. While *Ashe* made reference to "any future lawsuit," it did not limit its holding to successive prosecutions. Instead, in order to effectuate the purpose of collateral estoppel, the analysis should focus on whether an issue of ultimate fact has been determined by a valid and final judgment from a prior proceeding regardless of whether or not the present proceeding is a successive prosecution.[5]

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[5] The overwhelming majority of the case law supports the application of the doctrine of collateral estoppel to the situation where a defendant is acquitted on one count and the jury failed to reach a verdict on another count. *See, e.g., United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979); *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989), *cert. denied sub nom. DeBusk v. United States*,

Finally, the petitioner claimed that collateral estoppel should have no effect because the acquittal-deadlock situation is analogous to inconsistent verdicts wherein this Court has held that collateral estoppel has no application to the inconsistent verdict situation. *See* Petitioner's Petition at 15-6. Certainly, inconsistent verdicts are tolerated, *see, e.g., United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932), but "it hardly follows from the fact that a single jury in one trial is allowed to render inconsistent verdicts that a *second* jury in a *second* trial should be permitted to rely on the evidence rejected by the first." *United States v. Mespoulede*, 597 F.2d 329, 336 (2d Cir. 1979). In *Mespoulede*, the Second Circuit further explained:

> We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that

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493 U.S. 1083 (1990); *United States v. Gornto*, 792 F.2d 1028, 1034-36 (11th Cir. 1986); *Green v. United States*, 426 F.2d 661 (D.C. Cir. 1970) (per curiam); *United States v. Davis*, 369 F.2d 775 (4th Cir. 1966); *United States v. Kenny*, 236 F.2d 128 (3rd Cir. 1956); *United States v. Hans*, 548 F. Supp. 1119, 1124-6 (S.D. Ohio 1982); *United States v. Flowers*, 255 F. Supp. 485 (E.D.N.C. 1966); *Commonwealth v. Harris*, 582 A.2d 1319, 1321-2 (Pa. Super. 1990); *Ferrell v. State*, 318 Md. 235, 567 A.2d 937, 947, *cert. denied*, 110 S. Ct. 3301 (1990); *Powers v. State*, 285 Md. 269, 285, 401 A.2d 1031, 1040 (1979).

> the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it supposed to represent. Occasional anomalies are the price of unanimity. . . .
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> Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the same ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id., at 336-7; *see also State v. Aparo,* 223 Conn. at 392 (Pet. App. 9A).

Furthermore, application of collateral estoppel to the mistried count at a retrial is reconcilable with the rule that inconsistent verdicts are permissible since there is no inconsistence between an acquittal on one count and no verdict on another count having a common issue of ultimate fact. A mistrial is equivalent to no trial at all; it is not a final determination and decides no question of fact. Therefore, a jury's failure to agree, which results in a mistrial, does not establish any facts, and thus cannot

establish facts inconsistent with those established by its verdict of acquittal.

Accordingly, since the petitioner has failed to raise a substantial federal claim worthy of this Court's review in that the Connecticut Supreme Court properly applied collateral estoppel to the case at bar in accordance with the principle enunciated in *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court should deny the petition.

C. The Connecticut Supreme Court's Determination That Evidence Of A Crime Of Which The Respondent Was Acquitted Should Be Excluded At The Retrial If The Prior Jury Demonstrably Harbored A Reasonable Doubt On That Evidence And If That Evidence Would Establish An Element Of The Charged Offense Is In Accordance With Established Law.

The petitioner claimed that since collateral estoppel precludes only relitigation of ultimate issues and does not operate to bar the reuse of evidentiary facts, the Connecticut Supreme Court erred in its application of collateral estoppel in this case. *See* Petitioner's Petition at 18. However, petitioner's claim ignores this Court's holding in *Ashe v. Swenson* as well as the opinion of the Connecticut Supreme Court in this case. *See State v. Aparo*, 223 Conn. 384, 404-11 (1992) (Pet. App. at 21A-28A).

The Connecticut Supreme Court agreed that collateral estoppel precludes relitigation of ultimate facts: "[e]vidence of predicate facts, rather than ultimate facts, need not be proven beyond a reasonable doubt; and is,

therefore, not barred by collateral estoppel." *Id.*, at 407 (Pet. App. at 24A). It stated that "[c]ollateral estoppel 'means simply when an issue of ultimate fact has once been determined by a final and valid judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Aparo*, 223 Conn. at 406 (citing *Ashe v. Swenson*, 397 U.S. at 443).

The Connecticut Supreme Court reversed the trial court's decision that no evidence should be excluded at a retrial and held that "evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it would establish an element of the charged offense and could therefore form the basis of the conviction." *Id.* at 409 (citations omitted) (Pet. App. at 26A). The court further noted the following:

> In the case now before us, at least some of the evidence that, if believed, would have established the defendant's guilt of being an accessory to murder, would also have established that, intending that the crime of murder be performed, she entered into a conspiracy with Coleman. In *Dowling*, the prior crime evidence was relevant to an essential element but would not itself, if proved, establish that essential element. ... In this case, however, like *Ashe* and unlike *Dowling*, the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill. For example, Coleman testified that during the August 4 telephone conversations, the defendant first told him

> to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it happened. Assuming as we are required to do, that the jury complied with the court's instructions, *its acquittal on the accessory charge requires the conclusion that it found that these alleged facts had not been proven beyond a reasonable doubt.* "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [the defendant had made those statements], the State could not present the same or different . . . evidence in a second prosecution . . . in the hope that a different jury might find that evidence more convincing." *Ashe v. Swenson*, at 446.

Aparo, 223 Conn. at 409-10 (Pet. App. at 26A-27A).

The Connecticut Supreme Court's decision is in accord with this Court's decision in *Ashe v. Swenson*. This Court noted in *Ashe*, that collateral estoppel "requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict *upon an issue other than that which the defendant seeks to foreclose from consideration.*" *Ashe, 397 U.S. at 444* (emphasis added). In *Ashe*, the issue that the defense sought to foreclose was the identification issue and this Court held that a rational jury must have determined that the petitioner was not one of the robbers. *Id.*, at 445. "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the

petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution ...." *Id.*, at 446.

Likewise, in the case at bar, the Connecticut Supreme Court correctly determined that the petitioner may not present the same evidence on intent to commit murder -- the common element between the acquitted count and the charged offense -- when a jury had determined on conflicting testimony that there was at least a reasonable doubt as to that evidence. As the court noted, the jury had to have rejected Coleman's testimony about the telephone call on the night before the murder as not proving beyond a reasonable doubt that she had the intent to murder her mother. This determination is in accord with the primary purpose of the doctrine of collateral estoppel, in that it protects the respondent from the unfairness of being required to relitigate an issue which a jury has already rejected.

The petitioner referred to this Court's recent decision in *Dowling v. United States*, 493 U.S. 342 (1990), and argued that this Court refused to convert collateral estoppel protection into a blanket prohibition on the reuse of evidence in a subsequent prosecution after acquittal in a prior trial. *See* Petitioner's Petition at 19-20. The Connecticut Supreme Court discussed *Dowling* at length in its decision:

> *Dowling* held that, under the facts there presented, collateral estoppel did not bar the introduction of evidence of a crime that the defendant had previously been acquitted of committing. Dowling was first tried and acquitted for robbery A.

> Thereafter, he was prosecuted for robbery B, which (unlike the two robberies for which the defendant was successively tried in *Ashe v. Swenson, supra*) occurred at a different time and place. In that trial, evidence of his conduct in committing robbery A was offered to prove his identity as the perpetrator of robbery B: in both robberies, the perpetrator had worn a ski mask, had carried a small pistol, and had been accompanied by a man named Delroy Christian. The court held that this did not constitute double jeopardy, noting that, "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." The court noted that under the relevant rule of evidence, a similar act by the defendant is relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Because the second trial did not require the state to prove Dowling's participation in robbery A beyond a reasonable doubt, the doctrine of collateral estoppel was inapplicable.

Aparo, 223 Conn. at 406-7 (citations omitted) (Pet. App. 23A-24A). The Connecticut Supreme Court further noted that *Dowling* "does not suggest ... that the court intended to discard the well established rule that collateral estoppel may exclude evidence in certain cases." *Id.*, at 408 n.9 (Pet. App. 25A). The case at hand is distinguishable from *Dowling* in several respects. First, there were two separate robberies at issue in *Dowling*, whereas in the case at bar, the two charges revolve around the same incident. Secondly, at the respondent's second trial, the petitioner will be seeking to introduce the same evidence on the same element of the crime charged that a prior jury harbored a

reasonable doubt on -- in other words, a prior jury had already rejected the evidence as not proving beyond a reasonable doubt that the respondent intended to commit murder. It is not a situation where the petitioner is attempting to introduce prior similar act evidence under the rules of evidence. Therefore, the Connecticut Supreme Court's decision is not inconsistent with this Court's decision in *Dowling*.

The petitioner also claimed -- without any analysis or discussion -- that the Connecticut Supreme Court's application of collateral estoppel to the facts of this case conflicts with *Grady v. Corbin*, 495 U.S. 508 (1990). *See* Petitioner's Petition, at 20, however, this argument is without merit. In *Grady*, this Court held that the double jeopardy clause "bars any subsequent prosecution in which the government to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. ... The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." 495 U.S. at 521.

However, *Grady* was a pure double jeopardy case and has no bearing on the collateral estoppel analysis of double jeopardy. *Grady* did not overrule *Ashe v. Swenson*, and therefore, since the Connecticut Supreme Court based its decision on the *Ashe* analysis, *Grady v. Corbin* in inapplicable to the case at bar.[6]

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[6] If *Grady*'s "conduct constituting an offense" test applies in the collateral estoppel context in determining whether certain evidence should be excluded at a retrial, then the respondent would

Finally, the petitioner's claim that the Connecticut Supreme Court's decision conflicts with courts holding that an acquittal on one set of facts does not preclude use of the same evidence at a subsequent trial ignores the holding in *State v. Aparo*. First, the Connecticut Supreme Court did not hold that all of the evidence introduced at the first trial will be precluded at the second trial; rather, the court held only that evidence offered in the first trial must be excluded "if (1) it can be demonstrated that the jury, in acquitting the defendant of the accessory count in the first trial, harbored a reasonable doubt as to the truth of the fact sought to be proven, and (2) the alleged fact, if proven, would establish an element of the offense of conspiracy, and could, therefore, form the basis of a conviction on that count." *Aparo*, 223 Conn. at 410-11 (Pet. App. 27A-28A).

Secondly, this holding is not inconsistent with the holdings of the cases cited by petitioner. *See* Petitioner's Petition at 22-3. None of the cases relied upon by the petitioner hold that an acquittal on one set of facts *never* precludes use of the same evidence at a subsequent trial.

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prevail in this case. On the charge for which the respondent was acquitted, murder as an accessory, the petitioner had to prove three elements as charged by the trial court: (1) that the respondent intended to cause the death of her mother; (2) that with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, (3) that acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother. *See* Respondent's Appendix 5A. At the retrial, the second jury will be trying to prove the same conduct; namely, that the respondent intended to cause her mother's death and that she entered into an agreement (or that she joined) to commit murder.

For example, in *United States v. Farmer*, 923 F.2d 1557 (11th Cir. 1991), the defendant was acquitted of the conspiracy count, but the jury failed to reach a verdict on the substantive count of willful deprivation of another's civil rights. On retrial of the substantive count, the defendant was convicted. On appeal, the Eleventh Circuit rejected the defendant's claim that the retrial should have been barred based upon principles of collateral estoppel. The court held that under the specific facts of that case, the jury was not presented with the same issue at retrial. The court stated that whether he entered into an agreement with state officials -- which he was acquitted of -- and whether he acted under color of state law -- as required by the substantive count -- were different issues, and therefore, collateral estoppel was inapplicable. *See Farmer*, 923 F.2d at 1563-4. The *Farmer* court did not hold that an acquittal on one set of facts *never* precludes use of the same evidence at a subsequent trial; it simply held that in that particular case, collateral estoppel was inapplicable. Therefore, *State v. Aparo* is not in conflict with either the *Farmer* decision, or with any of the other cited decisions. Rather, the Connecticut Supreme Court applied collateral estoppel to the case at bar in accordance with this Court's decision in *Ashe v. Swenson*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Connecticut Supreme Court should be denied in that the petitioner has failed to raise a substantial federal claim worthy of this Court's review since the Connecticut Supreme Court properly applied the principle of collateral estoppel to the case at bar in accordance with established law.

THE RESPONDENT

BY

HUBERT J. SANTOS
A Member of the Bar of
the Supreme Court of the
United States

No. 92-1067

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,

Petitioner

v.

KARIN APARO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

APPENDICES TO BRIEF IN OPPOSITION

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No. 53529	: SUPERIOR COURT
STATE OF CONNECTICUT	: HARTFORD/NEW BRITAIN JUDICIAL DISTRICT at HARTFORD
v.	
KARIN E. APARO	: SEPTEMBER 29, 1987

INFORMATION

COUNT ONE

James E. Thomas, Assistant State's Attorney for the Judicial District of Hartford/New Britain accuses Karin E. Aparo of Glastonbury of the crime of MURDER, in violation of Connecticut General Statutes Sections 53a-54a(a) and 53a-8, and charges that at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with the intent to cause the death of Joyce Aparo the defendant solicited, requested, importuned and intentionally aided Dennis Coleman to intentionally cause the death of Joyce Aparo on or about August 5, 1987 at approximately 1:56 A.M. at or near 3 Butternut Drive, Glastonbury, Connecticut.

COUNT TWO

And the said Attorney further accuses said defendant of the crime of CONSPIRACY TO COMMIT MURDER, in violation of Connecticut General Statutes Sections 53a-48 and 53a-54a(a), and charges that:

a) at or near the town of Glastonbury, Connecticut on divers dates between August 1986 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY; and

b) at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY.

Transcript of Jury Charge, June 18, 1990
Beginning at page 38.

... I've just given you one instruction on the two parts of the count of conspiracy. However, it applies to both parts, so you must consider both each part separately and make a finding as to each part separately.

Beginning at page 40.
As to the second count, each part will be read separately, so the clerk will read part (a), and then ask how did the jury find the defendant, guilty or not guilty . . . and then the second part will be read, and, likewise, the foreperson will be asked.

Transcript of Jury Charge, June 27, 1990
Beginning at page 95.

THE COURT: Ladies and gentlemen, I have received your communication, "You Honor, the jury would like to rehear your Honor's instructions regarding the distinction between count two conspiracy charges (a) and (b), including examples provided by the court to illustrate this distinction." I don't recall that I gave you any examples to indicate a distinction, and in answer to your question, the distinction is only one of semantics, because if you were to find the elements of either (a) or ((b), you would necessarily find all of the elements of the other. With that, I will ask you to resume your deliberations.

Transcript of Jury Charge, June 18, 1990
Beginning at page 30.

There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother.